JD(SF)-12-21
Las Vegas, NV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CA

ENCORE EVENT TECHNOLOGIES, LLC

AND **CASES 28–CA–234207**
28–CA–246253

JOSHUA BOGGS, an Individual

Rodolfo Martinez, Esq., for the Acting General Counsel.
David Shankman, Esq., (Shankman Leone, P.A.), for the Respondent.

DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me on January 20–21, 2021, via the Zoom for Government videoconferencing platform. Charging Party filed charges on January 16, 2019, and August 8, 2019, alleging that Respondent refused to recall him for work in violation of Section 8(a)(1) the National Labor Relations Act, as amended (the Act), and that he was issued a letter of no rehire making him no longer eligible for work with Respondent in violation of Section 8(a)(1) and (4) of the Act. Respondent filed an answer to the complaint denying that it violated the Act.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and I find that

1. (a) The charge in Case 28-CA-234207 was filed by Boggs on January 16, 2019.
(b) The charge in Case 28-CA-246253 was filed by Boggs on August 8, 2019.

2. (a) At all material times, Respondent has been a limited liability company with an office and place of business in Las Vegas, Nevada (Respondent's facility), and has been engaged in providing creative services, production support, and technical hardware for events and shows.

(b) In conducting its operations during the 12-month period ending January 16, 2018, Respondent purchased and received at Respondent's facility goods valued in excess of $50,000 directly from points outside the State of Nevada.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the International Alliance of Theatrical Stage Employees and Moving Pictures Technicians, Artists, and Allied Crafts of the United States, its Territories and Canada, Local 720 (the Union), has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Peter You	-	Project Manager
Keith Bugeda	-	Operations Manager
Kenneth Barton	-	Floor Supervisor
Shari Iwaki	-	Director of Employee & Labor Relations

5. (a) At all material times, by virtue of Section 9(a) of the Act, the has been the exclusive collective-bargaining representative of employees of Respondent performing traditional stagehand and wardrobe work performed by Respondent at the Las Vegas Convention Center and in the Las Vegas Metropolitan area related to the production of trade shows, exhibitions, conventions, or the temporary or permanent installation of any stages, lighting, audio, video, or scenic elements and work performed in legitimate theater, showrooms or lounges (the Unit).

(b) At all material times, Respondent and the Union have maintained in effect and enforced a collective-bargaining agreement covering wages, hours and other terms and conditions of employment of the Unit.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent provides audio visual meeting services to more than thirty hotel properties in Las Vegas. Included among the properties its services are MGM properties the Venetian Sands, Mandalay Bay, Caesars, and the Aria. Respondent employs both non-union and union labor at the work locations. Employees that are assigned to a specific property are considered fulltime "house crew" employees. (GC Exh. 3). Respondent utilizes employees in various job classifications, including moving light operators, video engineers, audio technicians, and advanced audio technicians, each position requiring varying levels of skill and responsibilities with each classification having its own particular pay scale. (GC Exh. 3).

Respondent has a collective-bargaining relationship with International Union of Theatrical Stage Employees, Local 720 (the Union). Under the terms of the CBA, Respondent can request employees through "letter of request" or through "open calls. (GC Exh. X 3 at 8–10). A "letter of request" means that Respondent is requesting an employee by name. The Respondent sometimes refers to this method as "call by name." "Call by name" simply means that Respondent can identify a specific IATSE Local 720 member to be assigned to the call. (GC Exh. 3). These requests are electronically sent to the Union and Respondent keeps documentation. (Tr. 30: 5–19; 68:13–69:8; 126: 11–18;173: 5–8). Each property location is responsible for managing and determining which members of IATSE Local 720 it will "call by name." (Tr. at 128, 140). Employees can be requested by name whether or not they are signed into the Union's dispatch system. (Tr. 175–176). At the Aria resort, at all times relevant to the proceedings in this matter, the call-by-name list was managed by Director of Operations Keith Bugeda (Bugeda). (Tr. at 34, 36).

The second method for requesting employees is the "open call." Under the open call process Respondent identifies the number of employees needed and the particular skillset and the union selects and dispatches employees to fulfill the request. (GC Ex. 3). Typically, an employee will notify the union when they are available for "open calls." The relevant CBA provisions related to the dispatch process are found in Article 6 of the CBA which provides in relevant part the following:

6.01. Where the Employer is acting exclusively as a payroller or payroll service, the Employer will call the Union's dispatch office to request such applicants as the Employer may need by classification. It shall be the Employer's responsibility when requesting applicants to state the qualifications applicants are expected to possess, the functions they will be expected to perform, and the period of time they are expected to work. The Employer shall give the Union as much advance notice as possible of its anticipated employment needs. The Union shall immediately advise the Employer if it is unable to meet its requirements. The Employer shall then have the right to request employees from any source but then must notify the Union of the names, classifications and dates of hire of such employees. An Employer may reclassify an employee if changes in the job requirements or employee's skill require such a change.

6.02. In the employment of applicants for all work covered by this Agreement, where the Employer is not acting as a payroller pursuant to Section 6.01, the Employer shall have the right to request any employees whose names are maintained on a roster maintained by the Union. If the Employer wants to hire an individual(s) who is not on the roster, the Employer may hire such individual(s) so long as the Employer provides the Union with the name of the individual(s) hired within forty-eight (48) hours of hiring. At any time, the Employer shall provide to the Union the names of individuals who shall be added to the roster. The Employer shall not abuse this privilege.

6.04. The Employer shall be the sole judge as to the competency and qualifications of all employees and applicants for employment. The Employer may reject any job applicant referred by the Union, provided, however, that no applicant or employee shall be discriminated against because of his union or nonunion status, nor

because of his participation in concerted activities protected under the Labor Management Relations Act, 1947, as amended.

The CBA also provides specific wage scales and procedures for meal periods and meal pay. (GC Exh. 9 at 3–5, 10–11). If an employee is called to work, they are expected to notify the employer if work requests will trigger a meal penalty or if they are about to enter a premium pay status. (Tr. at 98–99, 221–222).

On occasion, employees are determined to be ineligible to be called back to work. If the employer decides this is the case, it issues what it calls a "a letter of no rehire." (Tr. at 129). The purpose of the letter is to notify the union that a particular member is no longer eligible to perform work for Encore (Tr. at 129). The decision on whether to issue a letter of no rehire with respect to IATSE Local 720 members is made solely by the Director of Human Resources Shari Iwaki. (Tr. at 129, 259).

Charging Party's Employment at Encore

From 2016 to mid-2019 Charging Party performed work both after being specifically requested under the "call by name" procedure and the open call procedure. (GC Exh. 9 and 10). Although Charging Party worked for Respondent through both letters of request and open calls, he was never a part of the "house crew." (GC Exh. 9, Tr. 97). He was first dispatched to work for Encore via an "open call" in June 2016. (Tr. 195). Charging Party worked in each of the various job classifications under the CBA depending upon the needs of the employer for the event that was underway at the property. Charging Party's pay varied depending on the job he was performing as mandated by the CBA.

The May 23, 2018 Incident

On or about May 23, 2018, Charging Party was called to work a 4-hour shift. During the shift he was to come in to "strike some lights" and leave.[1] He had another job lined up afterwards and planned on "knocking it out" and going to his next call. (Tr. 205). When he was about to leave, he was approached by Kenneth Barton, the Manager of Operations. Barton asked him to stay and perform other tasks. Charging Party described the conversation as follows:

"Kenny was asking me to do some other tasks that I wasn't dispatched for. And I told him that I couldn't, that I had another gig, and that it was already approved by Keith. And he told me that I wasn't that's not what a team player does, we're all here for each other, and we don't do that. And I told him, I was, like, well, I was dispatched for this position, I already had the conversation with Keith, he approved it, and I needed to go, and that the riggers come in, do a 4-hour mini and get out as quickly as possible. And he was, like, well, we're AV techs. We're not we're the house. We're not riggers, and we don't do that. But fine, go ahead." (Tr. 205).

[1] "Striking" refers to the process of removing items and boxing them up. (Tr. 249).

In June of 2018, Charging Party met with Keith Bugeda, the Director of Operations. Charging Party's primary purpose in meeting Bugeda was to discuss Barton telling others that he wasn't going use Charging Party on his crews anymore. In essence, he explained to Bugeda his version of events regarding the May 23, 2018 incident. Budega explained to Charging Party that, he kept "changing his pay rates, and kept trying to get more money" from Respondent that "looked bad for him," and explained why it was bad for the company, and because of his actions Respondent wasn't able to meet its budget. (Tr. 246, 254)

Shortly thereafter Charging Party was taken off the letter of request list by Bugeda. The exact date this occurred is unclear as Bugeda was unsure regarding the specific date. The first evidence of this appears in an email from Bugeda dated July 7, 2018, wherein he requests that Charging Party be replaced for the call. (GC Exh. 6 p. 202).

On July 8, 2018, Charging Party spoke to Peter You, a project manager, he testified that Mr. You advised him that, "they were putting [him] on a time out, that Keith, or that Kenny and Richard Tango had a conversation in a manager's meeting that [he]was no longer playing ball. And because [he] was no longer playing ball, that to blacklist [him] to don't call [him] anymore." (Tr. 208–209).

On January 16, 2019, Charging Party filed his initial charge. To assist with the preparation of a response to the charge, Bugeda emailed Shari Iwaki the Director of Employee and Labor relations (West Coast Region) information related to Charging Party's employment. Included within the materials was an email statement regarding his decision to take Charging Party off the letter of request list. In it he stated as follows:

> As for why I put Joshua on the do not call list for Aria, I experienced Joshua changing his rate on the sign in sheet to something other than what he was dispatched for. Some of these were agreed upon, but several were not agreed upon. When I asked him why he changed his rate, the answer I would get is that he had for example touch a lighting, console and make an adjustment to the light via the console. He then claimed MLO rate for the 10 minutes of work, when he was doing other thing. Another example is he requested teleprompter rate because he had to help the teleprompter person with the system. My other challenges were that he keeping [sic]stating meal penalty, but would not note it on the sign in sheet, he would go volunteer to stay but never inform us he was in overtime or double time. I have talked to him about the not telling us he was going into overtime or double time, yet it kept happening. (GC Exh. 6 p. 189).

While the charge was pending, Charging Party worked at the Aria on June 9, 2019, and was seen by Bugeda and MGM security officials. On June 23, 2019, Bugeda sent Iwaki an email advising her that, "ARIA security informed [him] today that Joshua Boggs has been trespassed by MGM Resorts International and is not to be on any MGM Resorts property. Not sure if this needs to be passed along to anyone or not." (Resp. Exh. 3). On June 24, 2019, after receiving the information from Bugeda, Iwaki issued a "letter of no rehire." (Resp. Exh. 4). The letter stated in pertinent part that: "[w]e have been notified that Joshua Boggs has been permanently trespassed from all MGM Resorts locations. As a result, Mr. Boggs is no longer

eligible to work for Encore." (GC Exh. 4). Iwaki contacted the Bellagio to inquire further about the trespass and was notified by a representative of Bellagio on July 16, 2019, that Charging Party was trespassed in 2016 and that his trespass was still in effect and further, "that he is not allowed on any MGM Resorts Property." (Resp. Exh. 8).

Charging Party does not dispute that he was "trespassed" from the Bellagio in 2016. The reason for the trespass however is unclear as Charging Party would only provide limited details because of a confidentiality agreement he signed with Bellagio the details of which he was unwilling to discuss. (Tr. 215–219).

Analysis

1. The Timeliness of the 1st Charge

Respondent argues that Charging Party failed to file his charge within 6 months of the alleged unfair labor practice and therefore it should be dismissed citing 29 U.S.C. Section 160(b) which provides that, "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against who such charge is made…." See *Machinists Local Lodge 1424 v. NLRB*, 362 U.S. 411(1960). As conceded by Respondent, to hold Charging Party to the statute of limitations, Charging Party must have had "unequivocal notice." *Moeller Bros. Body Shop*, 306 NLRB 191,192 (1992). Respondent asserts that Charging Party had actual and/or constructive notice when he spoke to Mr. You on July 8, 2018. Acting General Counsel argues that Charging Party did not have unequivocal notice. (Acting General Counsel's Br. at 10–11).

Although undoubtedly it is a close question, given the nature of how Charging Party was dispatched to work, I find that Charging Party did not have unequivocal notice. In the first instance, it is undisputed that Charging Party was never officially notified of the decision by Bugeda. Had he been officially notified; Respondent's argument would be on stronger footing. Without official notification the question becomes whether Charging Party's conversation with Mr. You can be considered "unequivocal notice." Although the conversation with Mr. You clearly raised suspicions in Charging Party's mind, without official notification or further confirmation in the form of not being called to work Charging Party's knowledge cannot be said to be "unequivocal." Indeed because of the nature of how Charging Party was dispatched to work even if his suspicions were raised without official notification, it is logical that it would take time for those suspicions to be confirmed and in the Charging Party's case this took a period of months. See *Nelson Electrical Contracting Corp*., 332 NLRB 179 (2000) (finding no unequivocal notice where no official notice given to employees). For these reasons, I find the charge to be timely filed.

2. Charging Party's Concerted Activity

The concept of concerted activity has its basis in Section 7 of the Act. Section 7 of the Act in pertinent part states: "Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection." For the actions to be protected under the statute, they must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). "[W]hether an employee's activity is 'concerted' depends on the manner in which the employee's actions may be linked to those of his coworkers. . . . The concept of 'mutual aid or protection' focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees."' Id. at 153. In general, to find an employee's activity to be "concerted," the employee must be engaged with, or on the authority of, other employees and not solely by and on behalf of the employee herself. In *NLRB v. City Disposal Systems*, 465 U.S. 822, 835(1984), the court made clear however that a lone employee's invocation of a right grounded in a collective-bargaining agreement is considered "concerted activity" under the Act. See *Interboro Contractors, Inc*., 157 NLRB 1295, 1298 (1966), enforced, 388 F.2d 495 (2d Cir. 1967), (the filing of a grievance rooted in the collective-bargaining agreement is protected by Section 7 of the Act). See also, *NLRB v. PIE Nationwide, Inc*., 923 F.2d 506, 510, 514–516 (7th Cir. 1991) (employee engaged in protected activity when he refused an assignment based on his understanding of an oral agreement between the employer and the union); *NLRB v. CER, Inc*., 762 F.2d 482, 486 (5th Cir. 1985) (recognizing that Section 7 protects complaints prior to the filing of a grievance).

The General Counsel must initially show that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6, 8 (2019); see also *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1–2 (2020); *Wright Line,* 251 NLRB 1083, 1089 (1980). Evidence is probative of unlawful motivation only if it adds support to a reasonable inference that the employee's Section 7 activity was a motivating factor in the employer's decision to impose discipline. *General Motors LLC*, 369 NLRB No. 127 (2020).

If the General Counsel makes his initial case, the employer will be found to have violated the Act unless it meets its defense burden to prove that it would have taken the same action even in the absence of the Section 7 activity. See *Hobson Bearing International, Inc*., 365 NLRB No. 73, slip op. at 1 fn. 1 (2017). If the evidence as a whole "establishes that the reasons given for the [employer's] action are pretextual—that is, either false or not in fact relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp*., 340 NLRB 382, 385 (2003).

Respondent argued that Charging Party failed to establish that he engaged in protected activity because his refusal to stay and perform work was a personal issue. (Resp. Br. at 13). I disagree. Both Charging Party's refusal to work beyond the time he was expecting to work, and his insistence that he be paid according to the pay scales attributed to the type of work performed amounted to his attempt to enforce the contractual terms of the CBA and were clearly Section 7 activity as defined in *NLRB v. City Disposal Systems*. It is undisputed that Charging Party was qualified to perform the work and that Respondent continued to seek others to perform the work Charging Party could have performed. The evidence is also undisputed that the second element is met as Barton was directly aware of Charging Party's activity on May 23, 2018, and Bugeda was made directly aware of the issue when he met in person with Charging Party in June of 2018.

There is evidence sufficient to establish a causal relationship that Bugeda's actions were motivated by Charging Party's efforts to ensure that the employer abided by the terms of the CBA. Evidence of motivation to support the causal relationship lies in Charging Party specifically being told by Mr. You that he was being "blacklisted" for refusing to work on an assignment other that the one he was dispatched for as well as the timing of Bugeda's decision beginning at or around this same time frame. I find the Acting General Counsel met its initial burden regarding this allegation.

I also find that Acting General Counsel met its initial burden regarding Charging Party being issued a "letter of no rehire." There is no question that Charging Party filed a charge, and Respondent's action took place while the charge was pending, and it is undisputed that the employer was aware of the charge. The testimony that Charging Party was told he was going to be "blacklisted" and its willingness to stop calling him along with the timing of its actions is sufficient circumstantial evidence of a causal relationship between his protected activity and the issuance of the letter of no rehire.

Given the Acting General Counsel's success in meeting its initial burden for both claims, the question becomes whether Respondent can meet its defense burden to prove that it would have taken the same action even in the absence of the Section 7 activity. See *Hobson Bearing International, Inc*., 365 NLRB No. 73, slip op. at 1 fn. 1 (2017). I find that it has.

Regarding the first claim, Respondent asserted that the decision to specifically request an employee is a right guaranteed it under the CBA and that the exercise of its discretion in doing so is nothing more than the "lawful exercise of a negotiated contract right." Respondent also makes clear that once it ceased requesting Charging Party that decision didn't preclude him from working and in fact, he continued to remain eligible to work via the open call process under the CBA. Respondent points to other issues in Charging Party's performance of his duties including his changing of pay rates without approval and his failure to comply with his obligation to advise Respondent when he was approaching penalty or premium status as support for the actions it took. Respondent, and in particular Bugeda, perceived Charging Party as attempting to "game the system" to obtain additional compensation he wouldn't otherwise have been entitled to. The record contains evidence that confirms Respondent's claims. For example, in one documented incident, Charging Party changed his rate of pay from an advanced AV Tech to video engineer. (Tr. 254, GC Exh. 6 p. 199). I find that given the discretionary nature of the individual request process, the reasons offered by Respondent are sufficient to meet its burden of

showing that the same decision would have been made even absent Charging Party's Section 7 activity.[2]

Regarding the second claim, the undisputed evidence of record is that Charging Party was "trespassed" from MGM Resorts locations and that according to company policy this "trespass" made him ineligible to work for Encore. The evidence further established that others who were similarly trespassed were also issued letters of no rehire.[3] (Resp. Exh. 3–8). This evidence is sufficient to meet Respondent's burden regarding the letter of no rehire. The record is otherwise devoid of any evidence that Respondent's actions surrounding either its decision to not call Charging Party or its decision related to the "trespass" were otherwise pretextual.[4]

CONCLUSIONS OF LAW

1. Respondent's action of not recalling Charging Party did not violate Section 8(a)(1) of the Act.

2. Respondent's issuance of a letter on no rehire while the first charge was pending did not violate Section 8(a)(1) and (4) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

Order

The complaint is dismissed.

Dated, Washington, D.C. July 15, 2021

Dickie Montemayor
Administrative Law Judge

[2] Because the letter of trespass dated back to 2016, Charging Party would have not otherwise been eligible to be called during the 2018 timeframe had Respondent been aware of the trespass incident prior.

[3] In light of the fact that Charging Party refused to discuss the details of his "trespass" there is no evidence in the record that his "trespass" was in any way distinguishable from the employees that Respondent identified as comparators.

[4] Acting General Counsel argues that an adverse inference should be drawn against Respondent for failing to produce the subpoenaed witness Mr. You (an inference which could presumably establish pretext). I decline to do so. The Board in *Quicken Loans,* 367 NLRB No. 112 (2019), held that such "evidentiary holes" should remain unfilled.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.